

CHAPTER FIFTEEN

THE CROSS IN PUBLIC PLACES THE LEGAL SITUATION IN SWITZERLAND

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¹ This article is a translated and revised edition of: PAHUD DE MORTANGES, René and SÜESS, Raimund. 2012. "Religiöse Symbole in der Schule." In *Zwischen Kruzifix und Kreuz. Religion im Fokus der Öffentlichkeit*, edited by Christian Danz, and André Ritter, 75–94. Münster: Waxmann.

Introduction

Switzerland is, as many other countries in Western Europe, a land full of churches. The Catholic churches are easily recognised as such because of their cross on the top of their roof. And an observant visitor of Bern, the capital of Switzerland, may also discover that the Capitol² has its own cross on the dome of the building. And hikers shall find them even on the top of many mountains in this country. It has to be explained that in Switzerland there are cantons, which are traditionally Catholic and others, which are traditionally Protestant ones. In some traditionally Catholic cantons, you may find crosses in state buildings, as for example in a hall of the cantonal parliament or the local court hall, in public schools, in hospitals or homes for the elderly. At the University of Fribourg, which was founded 125 years ago for the Catholic people in this country, crucifixes can be found here and there.

The presence of a cross or crucifix in the public place is nowadays highly controversial. In general it can be observed that religious symbols gave reason to public discussions during the last years in Switzerland. What mostly led to discussions, however, were the religious symbols from religions that are “strange” in the eyes of the ancestral population. This fact can clearly be seen by the results of the popular vote regarding the now in the Constitution-anchored prohibition to construct minarets.

Nowadays, there is a heated discussion about the question, whether Muslim pupils are allowed to wear the headscarf in public schools. Moreover, there are discussions on whether a Burka-prohibition in public is needed.

Also the traditional Christian symbols in public places are increasingly questioned, this mostly from laic circles. Namely representatives of the movement of the freethinkers are bothered by the crosses and other symbols of Christianity, which is however the traditional religion and culture in Switzerland.

The trigger of such discussions was two social trends that happened at the same time, yet they were very contrary: The religious pluralisation on the one hand and the increasing secularisation on the other. The conflict over

² „Bundeshaus“, the Federal Palace of Switzerland, is the seat of the Federal Parliament and the Federal Council.

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religious symbols is a conflict about the visibility of religion and behind this, there may be as well the question about what should be the “leading culture” in Swiss society.

Local conflicts are eagerly collected and exploited by the media. This leads to a special drama regarding this topic and complicates therewith a possible solution of the problem. Many conflicts can be resolved consensually. In others, however, it becomes the task of a court to resolve the dispute.

This article shall at first portray the most recent discussions around the cross and its sociological and historic setting (chapters 2 and 3). Secondly, I will concentrate on the relevant legal sources as well as on essential decisions of the Swiss Supreme Court (chapters 4 and 5). Thirdly and lastly, I shall extract some consequences also within the regard of the crucifix-decision of the ECHR (chapter 6).

2. The discussion about the crucifix in autumn 2010

In autumn 2010, there was a heavy debate regarding the admissibility of the crucifix in public places. They were triggered by two simultaneous and similarly laid cases. In both cases, the issue was a crucifix, which was hanging in the classroom and which bothered some persons who were closely related to the freethinkers.

2.1. The case in the canton Wallis³

A teacher of a public school in a small village named Stalden in the canton Wallis received a dismissal with immediate effect by the beginning of October 2010. The reason of this action anchored in the failed relation of mutual trust, according to the official statement. Already a year and a half before this happened, the teacher decided to take away the crucifix from the wall of the classroom. And at first, there was no reaction to his action. The school administration did not act before the teacher in question

³ Switzerland is divided in 26 cantons. The canton Wallis (in German) or Valais (in French) is one of them. A canton is a member state of the federal state of Switzerland. A canton is mainly sovereign with its own constitution which, however, needs the acceptance of the federal state in order to enter into force. More informations in chapter 3.

became president of the freethinker society. In this function, he demanded from the school administration to inform all schools in the canton of “their” duty to take away the crucifixes if desired so by the parents. He justified his demand by a decision of the Swiss Supreme Court in 1990 (see below in chapter 5). Moreover, he criticised that there was too much influence of the Catholic Church in school subjects such as handicraft, music (singing) and German. It has to be said at this point, that the upper part of the canton Wallis is still very strongly influenced by the Catholic Church. His demand consisted in the consequent respect of the principle of a laic school system. His initiative, however, was too much for the commune of Stalden: He received his dismissal with immediate effect.

2.2. The case in the canton Luzern

In the summer of 2010 in the village of Triengen in the Canton of Lucerne, a father of two girls demanded their school to take away the crucifixes in their classrooms. The rector of the school, however, did not follow his request and explained this decision with the Christian and occidental traditions of Switzerland. The cantonal school administration, however, advised the commune of Triengen to follow the request of the father. The answer of the commune administration was the following: they took the crucifixes away and put simple crosses instead.

This case was not taken to a judiciary because this family who was originally from Germany suddenly moved back to Germany in the middle of the process after receiving a death threat.

2.3. Legal political initiatives

As a direct answer to the happenings in the upper part of the canton Wallis and in the canton of Lucerne, some moderate right politicians launched a petition with the name „the crucifixes stay“. The reason behind this action was to save the crucifix in public places. And already after only a few months, the petition was handed in to the government of the Canton of Lucerne.

Also, on a federal level, similar steps were introduced. An initiative brought in at the Swiss Parliament wanted to add the following passage to the Swiss Constitution: „Symbols of the Christian-occidental culture are

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allowed in public places. “⁴ The competent commission of the parliament, however, decided to not pursue this project.

These cases show that there was a big fuss about the topic, but in the end there was only a small factual change.

3. Some basic information regarding Switzerland

3.1. Social Facts

When it comes to the preservation of crucifixes by politicians and the people, we have to ask one question: How “Christian” is the Swiss population of today still?

The federal census of 2010 reports the following religion affiliations among the Swiss population: 38.6 % Roman Catholic Church; 28% Swiss Protestant Church; 5.5% other Christian Churches; about 0.2% Jewish; 4.5% Islamic Communities and 1.1% non-western beliefs (Hindu, Buddhists). 20.1% of the population do not belong to any religious domination. The religious or denominational affiliation of the remaining 2% of the population is not known. The numbers concerning religion and denominations have remained relatively unchanged for a long time. Only in the decades after World War II has the religious landscape evolved. Due to migration of workers from the traditionally Catholic countries Italy and Spain, the number of Catholics in the population rose considerably until 1970. Since the mid-1970s, foreign workers have been increasingly recruited from the traditionally Christian Orthodox and Muslim areas of Southern Europe. During the Balkan wars in the nineties, Switzerland took in many refugees from the former Yugoslavia. The number of Muslims has multiplied by fifteen since 1970 and today they constitute the third biggest religious community in Switzerland.

Simultaneously to the religious multiplication, the percentage of persons without a religious denomination rose from 1.5% in 1970 to 20.1% in 2010. Particularly in the urban centers of Switzerland, like for instance Zurich, Basel, and Geneva, the importance of churches within society has been decreasing. Especially in the cantons of Basel-Stadt and Geneva, the

⁴ German equivalent: „Symbole der christlich-abendländischen Kultur sind im öffentlichen Raum zugelassen.“

Roman Catholic Church and the Protestant Church are confronted with a dramatic loss of members. In the more rural regions of Switzerland, the decrease is smaller, but even there the tie between the members and their churches is becoming more of a formality, and services of churches are increasingly only sought for baptisms, funerals, and weddings. On the other hand, it is remarkable that most Swiss remain members of their churches despite considerable church taxes. They consider that their church nevertheless does something useful, even though they do not need it for their own purposes.

3.2. Historical and constitutional Backgrounds

As the introduction explained, there are traditionally Catholic and traditionally Protestant cantons in Switzerland. The debate of crucifixes in public places is only – if at all – a debate of some Catholic cantons. These cantonal differences shall be shortly explained hereafter:

At the beginning of the 16th century, the Swiss Confederation consisted of a conglomerate of autonomous States (*Stände*), which were connected by a network of alliances. Depending on their positions, these States were either a full member of the Confederation or so-called associates. Other parts of today's Switzerland were subject territories of one or several of these States. Since Catholicism was the only denomination until the end of the Middle Age, the Christians in the States naturally identified with the Roman Catholic Church. The splitting of belief of the Churches in the wake of the Reformation was an important test for the system of alliances of the Confederation. Some of the States turned to the Reformation, whereas others stayed with the old belief. In the fully autonomous States, the denominational exclusivity remained until the end of the old Confederation in 1798. Whoever did not want to be part of the official religion could move away, but had to leave their possessions. Only a few Protestant States mercifully granted a *ius emigrandi*.

After the States had held the church sovereignty during the *Ancien Régime*, the framers of the federal State of 1848 abstained from stipulating a federal competence in this field. According to the effective Federal Constitution (hereafter 'Constitution'), which entered into force in 2000, the following applies: "The regulation of the relationship between the church and the state shall be the responsibility of the Cantons." (Article 72 section 1).

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The federal State itself does not have a religious affiliation and does not favour any religion. On this level, state and religion are in principle separated. The preamble of the Constitution starts however with the invocation of God (“In the name of Almighty God!”). This is supposed to point out the existence of a higher power besides the people and the state. The invoked God must not only be understood in its Christian meaning; nor shall thus be founded a Christian State. The separation of state and religion is not explicitly mentioned in the Constitution, but is derived from the freedom of religion, which is protected directly on the level of the Constitution together with other fundamental rights (see below in chapter 4).

In Switzerland, apart from the freedom of religion, the majority of the state church law is cantonal law. Therefore, with 26 cantons, we have 26 different systems of state church law. Politicians and the population adhere to the cantonal sovereignty in this matter; this policy finds its justification in the small-area spaces and the considerable linguistic and cultural differences between the cantons.

4. Further relevant principles of the Swiss constitution

4.1. Freedom of religion and conscience (Art. 15)⁵

The first paragraph of article 15 of the Swiss Constitution states the following: *„The freedom of religion and conscience is guaranteed“*. The second paragraph then explains that *“Every person have the right to choose freely their religion or their philosophical convictions, and to profess them alone or in community with others”*

The paragraphs 3 and 4 treat more closely the aspect of the positive and negative freedom of religion.⁶ In general, it can be said that every use of a religious symbol, and therefore also the hanging of a cross or a crucifix or

⁵ For an official translation of the Federal Constitution of the Swiss Confederation: <<http://www.admin.ch/ch/e/rs/c101.html>>.

⁶ Art. 15, paragraph 3: „Every person has the right to join or to belong to a religious community, and to follow religious teachings.“

Art. 15, paragraph 4: „No person may be forced to join or belong to a religious community, to participate in a religious act, or to follow religious teachings.“

the wearing of a headscarf is included in this article 15 of the Swiss constitution.⁷

4.2. Cantonal competency in school matters (Art. 62)

According to article 62 of the Swiss Constitution, the competency of school matters is given to the cantons (para. 1). It is therefore the obligation of the cantons to provide primary education that is sufficient and accessible for everybody. Furthermore, they have to set the relevant guidelines and the necessary surveillance of the primary education (para. 2). This therefore also implicates the guarantee of the cantons to religious neutrality of these schools. Every school has to provide schooling that is accessible for every child, no matter the religious affiliation.⁸ This religious neutrality will be given a closer look in the following chapter.

4.3. The principle of religious neutrality

The principle of religious neutrality refuses that the state identifies to or prefers a certain religious community or a certain ideology.⁹ This principle has constitutional value and consists as a part of the religious freedom, stated in art. 15 of the Swiss Constitution, even though this is not mentioned explicitly in the Constitution.¹⁰ The state principle of neutrality is however not an absolute one. The Swiss Supreme Court explained that neutrality should not be seen equal as irreligious Laicism. Religious and metaphysical elements shall be given a place in the state acting. This is simply a “conflict-solution-principle” to avoid that people are disrespected in their own religion or ideology.

⁷ Cavelti, Urs Josef, and Andreas Kley. 2014. “art. 15, n. 10.” In *Die schweizerische Bundesverfassung, St.Galler Kommentar*, 3. Auflage, edited by Bernhard Ehrenzeller, Benjamin Schindler, Rainer J. Schweizer, Klaus A. Vallender, 354. Zürich/St.Gallen: Dike/Schulthess.

⁸ Ehrenzeller, Bernhard, and Markus Schott. 2008. “art. 62, n. 19.” In *Die schweizerische Bundesverfassung: St.Galler Kommentar*, 2. Auflage, edited by P. Mastronardi, K. A. Vallender, R. J. Schweizer, and B. Ehrenzeller, 1143. Zürich/St.Gallen: Dike/Schulthess; Häfelin, Ulrich, Walter Haller, and Helen Keller. 2012. *Schweizerisches Bundesstaatsrecht*. 8. vollständig überarbeitete und erweiterte Auflage, 129. Zürich: Schulthess.

⁹ Winzeler, Christoph. 2009. *Einführung in das Religionsverfassungsrecht der Schweiz*, 2. Auflage, 59. Zürich/Basel/Genf: Schulthess.

¹⁰ Winzeler, Christoph. 2009. *Einführung in das Religionsverfassungsrecht der Schweiz*, 2. Auflage, 60. Zürich/Basel/Genf: Schulthess.

The ideological principle of neutrality is of special value when it comes to a scholar environment¹¹. This is a very sensitive part, because a public school is a meeting point of many different ideologies and religions. Therefore, it seems impossible to define the ideological principle of neutrality in a scholar environment. The different demands and interests of all participants have to be respected in a moment of decision.¹² And therefore, the question whether a hanging crucifix (or the headscarf as another example) in a public school violates the principle of neutrality cannot be answered abstractly, it has to be decided based on the concrete elements of this particular situation.¹³

4.4. Limitations of fundamental rights (art. 36)¹⁴

Restrictions of human rights are in general possible according to art. 36 of the Swiss Constitution if the following three conditions are respected: a legal basis expressly foreseen by statute, a public interest and proportionality with the goals pursued. Furthermore, the essence of the fundamental right is inviolable. Regarding the freedom of religion, the Swiss Supreme Court defined the essence in the so called “forum internum”, in other words: the freedom to believe or not to believe and to be allowed to change the own opinion in every possible moment.¹⁵

¹¹ Regarding the religious neutrality in schools for example, Pahud de Mortanges, René. 2015. “art. 15, n. 44–53.” In *Basler Kommentar zur Bundesverfassung*, edited by Bernhard Waldmann, Eva Maria Belser, Astrid Epiney, 339–340. Basel: Helbing Lichtenhahn.

¹² See Tappenbeck, Christian R., and René Pahud de Mortanges. 2008. “Religionsfreiheit und religiöse Neutralität in der Schule.” In *Religiöse Neutralität, ein Rechtsprinzip in der multireligiösen Gesellschaft*, edited by René Pahud de Mortanges, 118. Zürich/Basel/Genf: Schulthess.

¹³ See for a closer view chapter 5.

¹⁴ See Pahud de Mortanges, René. 2015. “art. 15 n. 78 and following pages.” In *Basler Kommentar zur Bundesverfassung*, edited by Bernhard Waldmann, Eva Maria Belser, Astrid Epiney, 346–356. Basel: Helbing Lichtenhahn.

¹⁵ Cavelti, Urs Josef, and Andreas Kley. 2014. “art. 15, n. 32” with a closer glance at the practice of the Swiss Supreme Court. In *Die schweizerische Bundesverfassung, St.Galler Kommentar*, 3. Auflage, edited by Bernhard Ehrenzeller, Benjamin Schindler, Rainer J. Schweizer, Klaus A. Vallender, 362. Zürich/St.Gallen: Dike/Schulthess.

5. The case of the crucifix in 1990¹⁶

5.1. The decision in its different elements

In 1990 already, the Swiss Supreme Court had to decide a case very similar to those in 2010 (see Chapter 2.1). A teacher and three inhabitants of the village Cadro in the Canton of Tessin opposed themselves against a decision of the government of the village (Gemeinderat), to decorate the classrooms of the new primary school with crucifixes.

The Swiss Supreme Court, as the final legal instance in Switzerland, concluded that the hanging of crucifixes in classrooms of a primary school violates the religious neutrality of the state guaranteed by the Constitution. The state as guarantor of the confessional neutrality of public schools shall not be allowed to show its identification with a particular confession in such a strong way. The freedom of religion of these people who may feel intimidated or offended by the presence of crucifixes has to be respected. Religious symbols that are visibly placed may influence the pupils in their own spiritual development and in their religious convictions.¹⁷

In the same decision, however, the Supreme Court put into perspective that this decision was based on this particular situation and only valuable for this concrete situation, namely the classrooms of a primary school. The Court then explained explicitly that crucifixes placed in an entrance hall, in a hallway or in the cafeteria may be compatible with the religious neutrality of a school.¹⁸

5. 2. The evaluation of this decision by the doctrine

The crucifix-decision of the Swiss Supreme Court in 1990 was taken negatively by parts of the legal doctrine. It was criticised that the Supreme Court did not respect all relevant facts. The Court did assume a theoretic interference of third persons by crucifixes but did at the same time not take into account the concrete lifestyle of pupils and their parents in the Canton

¹⁶ Decision of the Swiss Supreme Court: BGE 116 Ia 252.

¹⁷ E. 6a und 7b.

¹⁸ E. 7a und 7c.

Tessin and in other traditionally Catholic regions in Switzerland.¹⁹ Furthermore, the contradictory argumentation in the decision of the Supreme Court was criticized: On the one hand, the Court states that confessional neutrality cannot be understood in an absolute manner. On the other hand, the Supreme Court resumed its decision on the basis of the principle of laicism²⁰, which is not pertinent in Switzerland. However, there were also positive reactions within the doctrine.²¹

6. The meaning of the crucifix-decision of the ECHR for Switzerland

6.1. Generalities

In 2011 the Grand Chamber of the European Court of Human Rights (ECHR) supported a decision of the Italian government. The latter insisted that crucifixes should be allowed in public schools of Italy. Without doubt, the European Court wanted to create a precedence. The appearance of the religious neutrality shall be in the margin of appreciation of the state whenever possible. Only in clear cases of religious indoctrination by the state, the European Court has a duty to act. In the case of Italy, however, the Grand Chamber decided that there was no such

¹⁹ Gut, Walter. 1997. *Kreuz und Kruzifixe in öffentlichen Räumen, Eine Auseinandersetzung mit Gerichtsentscheiden über Kreuze und Kruzifixe in kommunalen Schulzimmern*, 44. Zürich: NZN-Buchverlag.

²⁰ Decision of the Swiss Supreme Court: BGE 116 Ia 252 E. 5e.

²¹ Häfelin, Ulrich, Walter Haller, and Helen Keller. 2012. *Schweizerisches Bundesstaatsrecht*. 8. vollständig überarbeitete und erweiterte Auflage, 129. Zürich: Schulthess; Kraus, Dieter. 1993. "Schweizerisches Staatskirchenrecht: Hauptlinien des Verhältnisses von Staat und Kirche auf eidgenössischer und kantonaler Ebene." In *Jus ecclesiasticum*, 351. Tübingen: Mohr; Winzeler, Christoph. 2010. "Die öffentliche Schule als Werkstatt der Integration (am Beispiel der Rechtsprechung zur Religionsfreiheit)." In *Religion und Integration aus der Sicht des Rechts, Grundlagen – Problemfelder – Perspektiven*, edited by René Pahud de Mortanges, 154. Zürich: Schulthess; Plotke, Herbert. 2003. *Schweizerisches Schulrecht*, 202. Zürich: Haupt; Schwarzenberger, Scarlett. 2011. *Die Glaubens- und Gewissensfreiheit im Kontext der öffentlichen Schule. Rechtliche Leitplanken zu religiöser und weltanschaulicher Identität, Toleranz und Neutralität*, 55. Zürich: Schulthess.

duty because the public schools in Italy are very tolerant when it comes to (non-Christian) religious communities.²²

6.2. No direct impact for Switzerland

The decision of the Great Chamber has no direct legal consequences on Switzerland as signatory state of the European Convention on Human Rights. The crucifix decision of the Swiss Supreme Court in 1990 is therefore not invalid by this.

From the point of view of the swiss lawyer GIUSEP NAY however the Swiss Supreme Court should re-evaluate its decision of 1990 and follow the decision of the Grand Chamber.²³ But in one way or the other, the crucifix decision of the Supreme Court was an answer to a concrete case and even in the view of this decision of the European Court, the Swiss Supreme Court may conclude a different answer in a Swiss case. And just like there was no general and Swiss-wide order to take away all crucifixes in every classroom, there is nowadays no free pass in favour of them. It remains a decision that has to include all factors such as the religious environment and the sensitivity of the particular region. Where there is no one who feels disturbed by the presence of a crucifix, there is certainly no need to take them down. However, where there are persons who feel disturbed, a solution should be found that is acceptable to everyone.

6.3. Delicate appreciation in the particular case

When it comes to a decision regarding a possible interference of a fundamental right, the judiciary finds itself in a delicate situation. It must be decided whether the public interests have to be given higher importance than the fundamental right of the particular person. Without question, this balancing of interests is especially difficult when it comes to the education sector. In a school-situation, a multiplicity of interests have to be respected, such as the interests of the state, the ones of the teachers, of the

²² Decision of the ECHR (Grand Chamber) in *Lautsi and others vs Italy*, 18 March 2011; press release of the chancellor in English: <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95589#{"itemid":\["001-95589"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95589#{)> (visited last at 18. October 2014).

²³ See Nay, Giusep. 2011. "Kruzifixe in staatlichen Schulen. Keine Verletzung der Europäischen Menschenrechtskonvention." In *Schweizerische Kirchenzeitung*, Heft 22(2011):377.

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parents and their children, especially if there is a discussion on religious freedom. Therefore, a decision ought to be taken only in the concrete situation.²⁴ It seems almost impossible that religious neutrality can be preserved by applying an abstract principle by the state.²⁵ The case-to-case decisions have however a lack of judiciary security.²⁶

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²⁴ Epiney, Astrid, Robert Mosters, and Dominique Gross. 2002. "Islamisches Kopftuch und religiöse Neutralität an der öffentlichen Schule" [regarding the headscarf-case]. In *Muslimen und schweizerische Rechtsordnung*, edited by René Pahud de Mortanges and Erwin Tanner, 129 and 139. Freiburg (Schweiz): Universitätsverlag; Karlen, Peter. 1989. "Religiöse Symbole in öffentlichen Räumen. Zum Kruzifix-Entscheid des Bundesrates vom 29. Juni 1988." In *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBI)*, Bd. 92(2) (1989):12; Müller, Jörg Paul, and Markus Schefer. 2008. *Grundrechte in der Schweiz. Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 275. Bern: Stämpfli [regarding the headscarf-case]; Tappenbeck, Christian R., and René Pahud de Mortanges. 2008. "Religionsfreiheit und religiöse Neutralität in der Schule." In *Religiöse Neutralität, ein Rechtsprinzip in der multireligiösen Gesellschaft*, edited by René Pahud de Mortanges, 112. Zürich/Basel/Genf: Schulthess; Wyttenbach, Judith, and Walter Kälin. 2005. "Schulischer Bildungsauftrag und Grund- und Menschenrechte von Angehörigen religiös-kultureller Minderheiten." In *Aktuelle juristische Praxis* 14(2005):315.

²⁵ Tappenbeck, Christian R., and René Pahud de Mortanges. 2008. "Religionsfreiheit und religiöse Neutralität in der Schule." In *Religiöse Neutralität, ein Rechtsprinzip in der multireligiösen Gesellschaft*, edited by René Pahud de Mortanges, 120. Zürich/Basel/Genf: Schulthess.

²⁶ Similar in Winzeler, Christoph. 2010. "Die öffentliche Schule als Werkstatt der Integration (am Beispiel der Rechtsprechung zur Religionsfreiheit)." In *Religion und Integration aus der Sicht des Rechts*, edited by René Pahud de Mortanges, 154. Zürich: Schulthess.

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